Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

ALICE SUE BROWN,

Petitioner,

V.

CAMPBELL COUNTY BOARD OF EDUCATION, LARRY BRINTON, JR., DIRECTOR OF THE DIVISION OF WORKERS' COMPENSATION, TENNESSEE DEPARTMENT OF LABOR, SECOND INJURY FUND, STATE OF TENNESSEE, and CHARLES BURSON, ATTORNEY GENERAL FOR THE STATE OF TENNESSEE,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of The State of Tennessee

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Tennessee Code Annotated §§ 50-6-241 which sets out the methods for determining permanent partial disability benefits under Tennessee's Workers' Compensation Act, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Does Tennessee Code Annotated §§ 50-6-241 and 50-6-242, Tennessee's Workers' Compensation Act, which distinguishes among claimants for permanent partial disability benefits on account of educational attainments violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

3. Does Tennessee Code Annotated § 50-6-241 impermissibly conflict with the Americans with Disabilities Act of 1990, 42 U.S.C. § 701 et seq. or Section 794 of the Rehabilitation Act of 1973, 29 U.S.C. § 710 et seq.?

PARTIES TO THE PROCEEDINGS

Petitioner Alice Sue Brown ("Brown"), was an employee of Respondent Campbell Board of Education ("Board of Education"). The Respondent Board of Education operates the public schools in Campbell County, Tennessee, and was Brown's employer. Respondents Larry Brinton, Jr., Director of the Division of Workers' Compensation, Tennessee Department of Labor, Second Injury Fund, State of Tennessee, and Charles Burson, Attorney General for the State of Tennessee, collectively referred to hereinafter as "the State," are the Tennessee State officials charged with administering and defending the statutes whose constitutionality under the United States Constitution, and lack of fidelity to federal statute law, are being contested by Brown in these proceedings.

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Supreme Court of The State of Tennessee

PETITION FOR WRIT OF CERTIORARI

Petitioner Alice Sue Brown hereby petitions this Court for a Writ of Certiorari to the Supreme Court of the State of Tennessee.

OPINIONS BELOW

The Chancery Court of Campbell County, Tennessee issued an Order and Judgment filed on October 24, 1994 (Appendix ["App."] C); which found portions of the Tennessee's Workers' Compensation Act ("Act"), Tenn. Code Ann. §§ 50-6-241(a)(1), 241(b), 241(c), 242 "to be arbitrary, capricious, illegal, and unconstitutional because they violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution." The Tennessee Supreme Court on appeal filed its Judgment (App. A), and Opinion ("Opinion")(App. B), on December 28, 1995. The decision disapproved the chancery court decision that the relevant portions of the Act were unconstitutional, and rejected Brown's argument that T.C.A. § 50-6-241 impermissibly conflicted with the Americans with Disabilities Act of 1990, 42 U.S.C. § 701 et seq. or § 794 of the Rehabilitation Act of 1973, 42 U.S.C. § 710 et seq.

JURISDICTION

The Tennessee Supreme Court entered its Judgment (App. A), and Opinion (App. B), reversing the judgment of the Campbell County Chancery Court on December 28, 1995. This petition is thus filed within the time allowed by law. Supreme Court Rule 13.1, 13.4. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The **Equal Protection Clause** of the United States Constitution, Amendment XIV, § 1, provides in relevant part:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Tenn. Code Ann. § 50-6-241(a)(1),(b),(c)(Supp. 1995) (App. I).

Tenn. Code Ann. § 50-6-242 (Supp. 1994) (App. J).

Title 42 U.S.C. § 12101(2) (App. K).

Title 42 U.S.C. § 12131(2) (App. L).

Title 42 U.S.C. § 12132 (App. M).

STATEMENT OF THE CASE

Brown, was employed by the Board of Education as a cook (Amended Complaint in Civil Action No.: 13,417 (App. F ¶ 5). While working at the Jellico Elementary School ("School"), on October 6, 1992, Brown suffered injuries to her neck, left shoulder, left arm and upper back (Id. ¶ 5). As a result of this injury, which arose out of and in the course of her employment with the Board of Education, Brown was rendered disabled to work and earn wages, as well as incurring medical expenses (Id. ¶ 6).

Brown was injured again later that month upon her return to work. While working as a cook, Brown suddenly

slipped and fell, suffering serious and disabling injuries to her back, right hip, right leg, and other parts of her body" (Amended Complaint in Civil Action No.: 13,418; App. E ¶ 5). As a result of this injury, which also arose out of and in the course of her employment with the Board of Education, Brown was additionally rendered disabled to work and earn wages, as well as incurring medical expenses (Id. ¶ 6).

After these injuries, Brown was examined by Eugenio F. Vargas, M.D; that gentleman, a neurosurgeon, found "disc abnormalities" which did not require surgery (Opinion at 5; App. B at 10). As a consequence, the supreme court found, "Dr. Vargas found no objective indication that Brown had suffered a permanent injury as a result of the October 1992 work incidents" (Id.).

Dr. Durham was certain that Brown's "severe and chronic depression" (id. at 9), were aggravated by the two accidents (Id.) As the supreme court noted, however, "Dr. Durham could not provide a percentage of permanent mental disability under the AMA Guides because the Guides provide no such numerical percentages" (Id. at 9 to 10).

In addition, orthopedic surgeon William Kennedy "assessed an anatomical impairment rating of 21% to the whole body as a result of Brown's back and neck conditions" (Id. at 8)(footnote omitted). According to Norman Hankins, Ph.D., Brown's "vocational disability . . . is at least 95%" (Id. at 10).

Brown filed two complaints in the Campbell County Chancery Court. The first pleading, Civil Action No. 13,417

(App. H), was filed on August 23, 1993 with the Board of Education as the named defendant. The complaint sought benefits under the Tennessee Workers Compensation Law, T.C.A. § 50-6-101 et seq., for neck and other injuries suffered by Brown on October 6, 1992. The second pleading, Civil Action No. 13,418 (App. G), was filed on August 24, 1993 with the Board of Education as the named defendant. This complaint sought benefits for back and other injuries suffered by Brown in late October 1992. In each case Brown sought benefits from the Second Injury Fund, T.C.A. § 50-6-208, for her injuries.

Brown subsequently filed amended complaints on August 30, 1993 and October 13, 1993 respectively (App. F-E), adding Larry Brinton, Director of the Division of Workers' Compensation, Tennessee Department of Labor, the Second Injury Fund, the State of Tennessee, and Attorney General Charles Burson, as additional parties defendant for purposes of testing the constitutionality of the Tennessee Worker's Compensation Reform Act ("Act"). These parties will, as noted above, collectively be referred to as the "State." On December 6, 1993, the State moved for summary judgment on the ground that the Act was constitutional.

The trial court, after a hearing, issued an Order and Judgment (App. C), filed on October 24, 1994. The court found portions of the Act, T.C.A. §§ 50-6-241(a)(1), 241(b), 241(c), 242 "to be arbitrary, capricious, illegal, and unconstitutional because they violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and unfairly discriminate between workers whose medical problems are recognized by the [AMA] Guides and

those whose problems are not, such as mental trauma and chronic pain syndrome" (Order and Judgment ¶ 11 at 3). See also Order and Judgment ¶ 14 (App. C at 43 to 45-46). In addition, the court below also found that "T.C.A. Section 50-6-242 is discriminatory on its face because it clearly and unequivocally discriminates in favor of uneducated workers as compared with educated workers" (Id. ¶ 11; App. C at 45). The court also found that the legislation was "illegal and unconstitutional because the statute also violates equal protection of the Fourteenth Amendment of the United States Constitution in that it provides workers who return to the same employment with less disability than those workers who do not return to the same employment" (App. C ¶ 13 at 46). The Act was also found to be unconstitutional "because the statute requires that the multipliers established by T.C.A. Section 50-6-241(a) and T.C.A. Section 50-6-241(b) are maximum limits [and] the ratings in the [AMA] Guides have nothing whatever to do with the inability to work" (Order and Judgment [App. C ¶ 15 at 47).

The State thereafter perfected its appeal as to both cases. The Board of Education did not appeal the Order and Judgment below.

REASONS FOR GRANTING THE PETITION

1. **This case presents a significant constitutional issue regarding whether a recent amendment to Tennessee's Workers' Compensation Law, affecting thousands of employers and employees in that state, denies equal protection to injured workers by discriminating between workers whose medical problems are recognized by**

American Medical Society Guides and those who problems are not so recognized. The statute under consideration, T.C.A. § 50-6-241, when "[r]educed to its essentials . . . establishes maximum permanent disability awards for employees based on the medical impairment rating and multipliers selected by the [Tennessee] legislature" (Opinion at 8-9; App. B. at 13 to 15). Brown objected to the constitutionality of this scheme on the ground

> that [statutory] use of the AMA Guides . . . violates equal protection because (1) numerical percentage ratings are not provided for certain medical conditions, such as mental impairment or chronic pain, (2) factors other than a physician's interpretation of anatomical impairment are not considered in determining vocational disability and, (3) the AMA Guides themselves caution against their exclusive use in fashioning awards of vocational disability.

(Opinion at 17; App. B. at 25).

A detailed examination of the statutory scheme demonstrates the need for such review. T.C.A. § 50-6-241(a) sets a maximum award of 2½ times the "medical impairment rating" if the employee returns to work with his pre-injury employer at the same or greater wage. Absent such a return to work, the maximum award is six times the "medical impairment rating." The important consideration is the means by which this "medical impairment rating" is determined.[1]

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[1] The 2½/6 multiplier is itself subject to attack on the ground that there seems to be no rational basis for the choice of those two figures.

Under the statute, "the medical impairment rating [is] determined pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment." T.C.A. § 50-6-241(a)(1).[2]

The best evidence that use of the AMA Guides is arbitrary and capricious comes from the AMA Guides themselves.[3] The statute utilizes the AMA Guides to set disability awards. See T.C.A. § 50-6-241(a)(1). Yet the AMA Guides themselves point out that "impairment," which is what the AMA Guides deal with, and "disability," "which is the subject of the Act," are very different concepts:

> [W]hereas impairment is a medical matter, disability arises out of the interaction between impairment and external demands . . . Simply stated, "impairment" is

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[2] Among the sources of "the medical impairment rating" are:

> [T]he Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of Orthopedic Surgeons), or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community.

T.C.A. § 50-6-241(a)(1). Brown's emotional injury and her chronic pain are items "not covered by either of these," id., so that the catch-all phrase is inapplicable here.

[3] There is no more compelling evidence that use of the Guides is arbitrary and capricious than that of Brown's own personal circumstances. She was emotionally injured to a severe degree and suffers from disabling chronic pain, but application of the AMA Guides provided her with benefits for those injuries of exactly zero.

> what is wrong with the health of an individual; "disability" is the gap between what the individual can do and what the individual needs or wants to do. An individual who is "impaired" is not necessarily "disabled" . . . [I]f the individual is able to meet a particular set of demands, the individual is not "disabled" with respect to those demands, even though a medical evaluation may reveal impairment . . . The physician does not determine industrial loss of use or economic loss for the purpose of paying a disability benefit.

AMA Guides at 1-2 (emphasis in the original).

As a result, even the AMA Guides themselves implicitly warn against the use to which they have been put by the Tennessee legislature. And if this implicit warning was not enough, the warning was soon thereafter made utterly explicit:

> We encourage each system not to make a "one-to-one" translation of impairment to disability, in essence creating a use of the Guides which is not intended.

AMA Guides at 6 (emphasis supplied).

This conclusion of unconstitutionality with respect to use of the AMA Guides in this case flows from a consideration of the purpose of worker's compensation, which was historically stated to be as follows:

> The primary purpose of these benefits is to replace some proportion of wage loss, actual or potential . . . cash benefits should be closely tied to [the disabled individual's] loss of income . . . Workmen's compensation should replace a substantial proportion of the worker's lost renumeration.

The Report of the National Commission on State Workmen's Laws 33, 36-37 (1972). But the vice of the Act is that it attempts to make "scientific" and a matter of mere formula that which is simply not amenable to such treatment. A reasonable reading of the statute entails that these factors are to be considered only if neither the Guides nor the Orthopedic Manual governs the particular injury. See Tenn. Code Ann. § 50-6-241(a)(1). Of course, the supreme court asserts a construction of the Act under which these additional considerations are to be considered in all determinations but where the use of the AMA Guides simply provides the maximum figure for a permanent partial disability award (App. C. at 45). Even if this reading were correct, the statute is hardly saved from unconstitutionality as a result. To argue that the use of traditional (and constitutional) factors to fix benefits in less than the maximum amount, coupled with a parallel (but unconstitutional) employment of the AMA Guides to fix the maximum award, somehow cures the arbitrary and capricious nature of the statute is to turn accepted standards of constitutional and statutory analysis on their heads. As a scholarly criticism of such attempts points out:

> Policy makers should appreciate that the search for an "objective," "accurate," or purely "medical" system is

> and always will be fruitless. And they must resist the seductive but false hope that use of a scientifically or medically authored ratings systems can bypass the need to make the hard choices necessary for any loss assessment.

Book review of Pryor, Ellen Smith, Flawed Promises: A Critical Evaluation of the American Medical Association's "Guides to the Evaluation of Permanent Impairment, 103 Harv. L. Rev. 964, 976 (1990)(footnote omitted).

But one need not resort to law reviews to find compelling criticism of such compensation schemes. This Court itself disapproved HHS regulations that would have linked child disability entitlement to a list of impairments:

> No decision process restricted to comparing claimants' medical evidence to a fixed, finite set of medical criteria can respond adequately to the infinite variety of medical conditions and combinations thereof, the varying impact of such conditions due to the claimants' individual characteristics, and the constant evolution of medical diagnostic techniques.

Sullivan v. Zebly, 493 U.S. 521, 539 (1990). The use of the AMA Guides pursuant to the Act partakes of precisely the same vice. Worker's compensation systems were designed as a sort of trade-off; workers lost their right to sue their employers at common law for their work-related injuries in exchange for a statutory scheme under which they would receive at least partial compensation for losses of earning capacity suffered as a result of such injuries. The difficulty

is that the Act under examination fails in this task; it offers compensation on the basis of impairment rather than on the more logical grounds of lost earning capacity, lost income, or actual disability. As the chancery court pointed out, a system that is so tenuously related to a worker's actual lost earning capacity or actual ability to gain employment is "arbitrary, capricious, [and] irrational" (Order at 5; App. C at 47). Such a system is arbitrary and capricious and should be declared unconstitutional by this Court by way of granting the Writ of Certiorari here being sought.[4]

Brown acknowledges the general validity of her supreme court's philosophy that if a particular distinction "is rationally related to a legitimate state objective, the legislation should be held to be constitutional." Civil Service Merit Board v. Burson, 816 S.W.2d 725, 734 (Tenn. 1991). Precisely the same principle obtains in this Court. Hooper v. Bernalillo County Assessor, 472 U.S. 612, 618 (1985) ("Generally, a law will survive [equal protection] scrutiny if the distinction rationally furthers a legitimate state interest").

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[4] Even those decisions from other states that have approved workers' compensation schemes that utilize the AMA Guides to some extent or in various ways have not gone so far as the State in this regard. The Texas Supreme Court, for example, upheld the constitutionality of its Workers' Compensation Act of 1989, Tex. Labor Code § 401.001 et. seq. (Supp. 1994), an enactment which shares some features of the legislation before this Court, in Texas Workers' Compensation Commission v. Garcia, 893 S.W.2d 504 (Tex. 1995). But the Texas court expressly did not reach the equal protection question actually before this Court. Instead, "[w]e express no opinion as to whether the Act might violate due course of law as applied to a claimant suffering from a permanent physical ailment that is not rated under the [AMA] Guides." Id., at 526.

The state supreme court simply went through the analytic motions in reversing the chancery court so as to find the statutory scheme to comport with the demands of equal protection. It did so by invoking a number of black-letter principles of law disfavoring judicial findings of unconstitutionality. It noted the well-established rule that a statute is entitled to a strong presumption favoring its constitutionality. It observed that any doubt should be resolved in favor of the constitutionality of a statute. It suggested that a court has an obligation to uphold the constitutionality of a statute if there exists any reasonable construction which would satisfy the requirements of the Constitution. Moreover, it placed the burden upon the party attacking the statute to show its unconstitutionality (App. B. at 31 to 32). No one could possibly contest the abstract truth of these principles. But their invocation in the present context does little more than beg the question in issue. The issue before the Court is whether, in fact, application of these principles can save the constitutionality of the statutes under examination. Brown contends that they cannot.

Under the rational basis test, according to the state supreme court, there are "no bright-line rules for determining reasonableness" (Opinion at 14; App. B. at 22). But the reasons that court does usher forth in support of the statute simply fail to bear sustained scrutiny. For example, the court argues that use of the AMA Guides actually reduces unequal protection in that "[t]he multipliers substantially reduce the possibility of similarly situated workers with like injuries and anatomical disability ratings receiving vastly different awards" (Id. at 16; id. at 24).

But no such rational relationship has or can be shown in fact. There is simply no compelling or even rational reason why the legislature had to discriminate against workers suffering non-AMA Guide covered injuries in pursuit of the principle that "[r]easonably (sic) uniformity in statutory awards is a legitimate state interest" (id.; id.). See, e.g., Eisenstadt v. Baird, 405 U.S. 438, 447 n. 7 (1972)("the statutory classification would have to be . . . rationally related to a valid public purpose") (emphasis by the Court); Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 153 (Tenn. 1993)(rational basis test asks "whether the classifications have a reasonable relationship to a legitimate state interest"). Nor is it possible to determine what "legitimate state interest," id., is served by its so doing, and certainly the State has shown itself unable to articulate any such interest. There is nothing so magical about the AMA Guides that requires their statutory incorporation even in the face of blatant discrimination against workers unfortunate enough to suffer injuries not explicitly covered by new statute. In short, the Court should, for purposes of assessing this Petition, be guided in its examination of the purported rationale for the statutory use of the AMA Guides by the rule that "the mere recitation of a benign, compensatory purpose is not an automatic shield," Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975), against a searching equal protection analysis of the Tennessee statute.

The supreme court goes on in this connection to make a generalized plea that the legislature be allowed to have its way with this classification. Just a little discrimination never hurt anyone, it seems to say; and even if it actually does hurt its targets a little, such pain is unobjectionable because

"[e]qual protection does not require absolute equality" (Opinion at 13; App. B. at 21). The State then asserts, by coincidently echoing the familiar rule of Dandridge v. Williams, 397 U.S. 471 (1970), that "[e]qual protection does not . . . mandate that everyone receive the same advantages" (Opinion at 13-14; App. B. at 21). Brown by no means demands "absolute equality" (Id. at 13; id.). Nor does she demand that "everyone receive the same advantages" (Id. at 13-14; id.). What Brown does request of this Court is an appellate recognition by way of a grant of the Writ sought in this Petition that this discrimination does in fact offend the Constitution.

As the discussion both above and below demonstrates, this statutory scheme has many constitutional vices. Chief among them, and the primary reason why it cannot withstand appellate analysis and thus deserves scrutiny by this Court, is the fact that workers whose injuries include, for example, emotional or mental disabilities, or who suffer from chronic pain syndrome, are much less likely to receive just awards than their fellow workers whose injuries are recognized by the AMA Guides. As the chancery court noted:

> This lady has a[n AMA Guides] level four, and if I can remember way back a level four carried a percentage of like thirty or forty percent under the old law. And we're sitting here with a lady who is - diagnosed, as I recall, with a level four injury and you can't use any multiplier on it. I certainly think that is discrimination against a person with a psychological injury.

(Memorandum of Opinion at 4; App. D at 60 to 61). Such a blatant discrimination, which serves no legitimate or even discoverable state interest, is an impermissible denial of equal protection under both state, see State v. Sliger, 846 S.W.2d 262, 264 (Tenn. 1993)[5], and federal constitutional standards. Reed v. Reed, 404 U.S. 71, 75-76 (1971). This discrimination is deserving of review by this Court because of the thousands of employees and employers in Tennessee and other states with similar statutory schemes who are affected by the potential application of this statutory scheme.

The supreme court made much of the fact that, in theory at least, the AMA "caps are not absolute and do not apply in every case [but that t]rial courts have the discretion to exceed the caps in cases where the disabled faces the substantial vocational obstacles specifically set out in Tennessee Code Annotated Section 50-7-242" (Opinion at 16; App. B. at 24) (footnote omitted). It emphasizes as well the fact that the non-covered injuries can be compensated outside the operation of the AMA Guides. "When the injury in question is not covered by the Guides," the supreme court argued, "the rating is to be based on any 'appropriate method

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[5] The Opinion notes that "[b]oth the United States and Tennessee Constitutions guarantee to citizens the equal protection of the laws" (Opinion at 10; App. B. at A-17). Tennessee Const., art. I, § 8 (the "law of the land" clause), and art. XI, § 8 (the "general laws" provision) "have consistently [been] held [to] confer the same protection as does the Fourteenth Amendment to the United States Constitution" (Opinion at 11; App. B. at A-18). The discussion of the appropriate "standards of scrutiny" (id. at 11-12; id.), to be applied to this case, therefore, will assume that the Tennessee Supreme Court applied the same standard as would this Court under the Equal Protection Clause.

used and accepted by the medical community'" (Id. at 19-20; id. at 29, quoting T.C.A. § 50-6-241(a)(1),(b)).

The fact that, by way of a vague and open-ended statutory afterthought, the legislature provided for such non-covered injuries to be accorded "an impairment rating by any appropriate method used and accepted by the medical community," T.C.A. § 50-6-241(a)(1), by no means saves the statute. That one class of workers has the advantage of the tightly-organized and precise AMA Guides to define their impairments while the excluded class must search out some sort of cobbled-together ad hoc system to obtain benefits for their injuries, demonstrates the inequity of the impermissible inequality of protection afforded to these two classes of injured workers by the statute.

The fact, in other words, that the Tennessee statute provides an alternative in those cases where the AMA Guides do not apply fails, however, to suggest that T.C.A. § 50-6-241(a)(1) passes that "rational basis" test demanded by cases like Zobel v. Williams, 457 U.S. 55 (1982). The alternative that exists in § 50-6-241(a)(1) for cases not covered by the AMA Guides is simply not up to the task demanded of it; even the supreme court is implicitly forced to admit the difficulties inherent in totaling up part of an impairment under the AMA Guides and the rest of the impairment by other means (Opinion at 17; App. B at 25) ("Plaintiffs' assertions about the Guides are largely accurate. The Guides do not provide percentage ratings for some physical and mental impairments"). The problem with this State's acknowledgement in this regard is not that it is wrong, but that it does not go far enough.

Precisely the same rebuttal applies to the State's suggestion that use of the AMA Guides is not fatal because "the Guides are not the sole determining factor in setting an award of vocational disability" (Opinion at 20; App. B. at 29). When, however, the method for fixing physical disabilities can be easily divined from the AMA Guides but emotional injury and chronic pain must receive compensation, if at all, through application of an informal, ad hoc methodology, the claimant is unlikely indeed to receive just compensation for those injuries not covered by the AMA Guides. Indeed, the chancery court judge himself was frustrated by his inability under the statute to provide anything close to a fair award (Order at 4; App. C at 44). The AMA Guides represent a substantial amount of research by myriad physicians and researchers to quantify physical injuries. To ask a single practitioner to develop equally valid statistics for emotional injuries and chronic pain for a single patient is an unfair and unrealistic request that could not very likely be either accurately or satisfactorily accomplished by even the most expert and well-meaning of physicians. It follows that the inadequacies of the Tennessee statutory scheme is itself a denial of equal protection notwithstanding the legislature's off-hand and hopelessly general attempt to provide a statutory alternative to infirmities not covered by the AMA Guides.

The supreme court generally seeks to justify its mode of analysis by opting for what it calls "the reduced scrutiny test" (Opinion at 13; App. B at 20). Even if the the constitutionality of using AMA Guides in the manner contemplated in the statute is entitled to no more than this analysis, see. e.g., Massachusetts Board of Retirement v.

Murgia, 427 U.S. 307 (1976), one notes that the supreme court seeks to apply an even less stringent test. It seems to assume that a court should apply these rules against a finding of unconstitutionality with particular tenacity in the case of workers' compensation legislation. "This Court," the supreme court observes by way of citing five cases, "has upheld various provisions of Tennessee's workers' compensation scheme against constitutional challenges" (Opinion at 23 n. 9; App. B at 32 n. 9) (citations omitted).

Yet there seems little reason to insulate the statute from the searching inquiry to which legislation generally is justly subjected. In fact numerous courts in other states have recently found workers' compensation law to be unconstitutional on equal protection grounds.[6] There is no apparent reason why Tennessee's Act should prove an exception to this rule. The recent Tennessee enactment is unconstitutional in all the respects urged by Brown in her complaints and found by the chancery judge in his Order and Judgment. Given the importance of this issue to thousands of Tennessee workers at a minimum, this Court is respectfully asked to grant Brown's Petition for a Writ of Certiorari.

2. This case also presents a significant issue regarding whether recent amendments to Tennessee's Workers' Compensation Law, which affect thousands of employers and employees in that state, deny equal

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[6] See, e.g., Romero v. Industrial Claim Appeals Office, 902 P.2d 896 (Colo. Ct. App. 1995); Gilmore v. Alaska Workers' Compensation Board, 822 P.2d 922, 929 (Alaska 1994); Schrimer v. Homestake Mining Co., 118 N.M. 420, 882 P.2d 11, 14 (1994), for a few recent examples.

protection to injured workers by discriminating between educated and uneducated workers. The Tennessee supreme court improperly found that T.C.A. § 50-6-242 was equally capable of passing constitutional muster. What this statutory scheme means in practice is that an uneducated or poorly educated worker suffering a mental disability who suffers serious permanent disability can receive benefits for a maximum of four hundred weeks. On the other hand, a particular worker who has at least an eighth-grade education, transferable skills, and a serious mental disability, would receive no disability benefits at all because he could not satisfy the criteria set out in T.C.A. 50-6-242(1)-(4).

This portion of the legislation discriminates heavily in favor of un- or under-educated workers with serious mental problems and concomitantly denies equal protection to educated workers like Brown with serious mental problems. The chancery court below correctly found the scheme to be facially unconstitutional:

> As the statutory scheme is structured under Act, a mentally injured worker with college training but seriously and mentally impaired could in the end receive no benefits at all as compared with his more fortunate counterparts who suffered mental injuries and were uneducated. The result is that T.C.A. Section 50-6-242 impermissibly discriminates on the basis of eduction against workers who sustain serious disability from mental impairments.

(Order ¶ 11 at 4; App. C at 45). The supreme court defended T.C.A. § 50-6-242 on the ground that the distinction

made between educated and uneducated workers under the Act "is based on a reasonable difference" (Opinion at 21; App. B. at 31). In the eyes of that court, "older or less educated workers . . . may have a higher vocational disability so as to warrant a higher workers' compensation award" (Id.; id.). As a result, the court concludes, "there is a rational basis for the distinction" (Id.; id.).

It is by no means obvious that such a rational basis exists. The State neither offered, nor did the supreme court cite, any evidence whatever to support this theory. Brown also urges that the distinction in the statute between educated and uneducated workers, in the words of local constitutional jurisprudence, "should be subject to strict scrutiny [because] it impermissibly interferes with the exercise of a fundamental right (e.g., voting, intestate travel) or operates to the peculiar disadvantage of a suspect class (e.g. alienage, race)." Harrison v. Schrader, 569 S.W.2d 822, 825 (Tenn. 1978). See Clements v. Fashing, 457 U.S. 957, 963 (1982) ("We have departed from traditional equal protection principles only when the challenged statute places burdens upon 'suspect class" of persons or on a constitutional right that is deemed to be 'fundamental'")(Opinion of Rehnquist, J.).

Brown does not contend that educated workers are necessarily members of a "suspect class." Id. However, it is altogether possible that some level of education is a fundamental right, the pursuit of which would be unduly hindered by the legislation before this Court. Compare San Antonio School District v. Rodriguez, 411 U.S. 1, 35 (1973) ("education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we

find any basis for saying it is implicitly so protected") with id. at 36 (Court might grant "that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [the] right [to speak and to vote]"). Thus, even if education is not a fundamental right under the U.S. Constitution, it does seem to occupy a place in the pantheon of rights that places it above those entitlements entitled to the relaxed scrutiny of the rational basis test. Cf. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 441 (1985)(positing "somewhat heightened review" of discriminations made on account of illegitimacy").

In fact, however, education is in Tennessee a fundamental right even if it is not so characterized under the federal constitution. Tenn. Const. art. 11, § 12 (1980 Repl. Vol.), declares that the "[t]he State of Tennessee recognizes the inherent value of education and encourages its support." Similar state constitutional provisions have been held to make education a fundamental right as a result. See Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 148-50 (Tenn. 1993)(collecting cases). See also Opinion of the Justices, 624 So.2d 107, 157 (Ala. 1993), which collects such cases and declares that "[g]iven the history and text of Alabama's education article, the Court determines that the right to education in Alabama is fundamental[.]"[7]

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[7] Brown recognizes that the interpretation of the Tennessee Constitution is fundamentally a task for Tennessee courts. A state's constitution is binding on its legislature, however. Groves v. Singleton, 20 U.S. (15 Pet.) 449, 502-03 (1841). If education is a fundamental right under the Tennessee constitution, then the legislature's failure to honor that right in enacting workers' compensation legislation is itself a violation of equal protection for which review in this Court is proper.

The supreme court in McWherter noted that it traditionally applies either reduced, heightened, or strict levels of scrutiny in assessing equal protection claims. Tennessee Small School Systems v. McWherter, supra, 851 S.W.2d at 153. The court did not find it necessary to determine into which category education fell because it agreed with the finding that "[i]n the case before the Court, the Chancellor found the public school system to be constitutionally invalid under all three levels of scrutiny." Id. Because the funding system failed even the "'rational basis' test . . . the plaintiffs will be found to prevail and further analysis will not be necessary." Id.

In this case Brown urges that T.C.A. § 50-6-242 similarly flunks all three scrutiny standards, reduced, heightened, and strict. See, e.g., Opinion of the Justices, supra, 624 So.2d at 160 ("Indeed, the Court cannot conclude that the differential treatment at issue here is rationally related to a legitimate state interest under the least searching tier of equal protection analysis, the rationality standard"). But because the statute clearly penalizes workers with higher educational attainments, Brown urges that application of either the heightened or strict scrutiny standard is appropriate, with a finding that equal protection has been violated as a result. The structure of T.C.A. § 50-6-242 is invalid because (a) it impermissibly and unreasonably discriminates against more educated workers with mental disabilities; and (b) offers a reward to workers for not attaining a minimal education level, thereby violating the constitutional duty binding the legislature to effectuate "the inherent value of education and encourage[] its support[.]" Tenn. Const. art. 11, § 12.

Most of the litigation in this area involves the right to an education rather than distinctions made on the basis of educational attainment. The paucity of cases involving discrimination of the sort in issue here is itself an indication of just how constitutionally far-fetched the structure of T.C.A. § 50-6-242 really is. Those few decisions that have analyzed distinctions more or less like those in issue here have doubted that they could withstand constitutional attack.

In Alexander v. Swank, 314 F. Supp. 1082 (N.D. Ill 1970), rev'd on other grounds sub nom. Townsend v. Swank, 404 U.S. 282 (1971), for example, the two courts adjudicating the case examined an Illinois statute and regulation that provided for Aid to Families with Dependant Children ("AFDC") benefits to children between ages 18 to 21 who were attending high school but denied similar benefits to children in college. The three-judge lower court applied the rational basis test and found "a rational connection between these legislative objectives and the classifications[.]" 314 F. Supp. at 1089.[8] This Court reversed the decision below on

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[8] As concurring judge Abraham Lincoln Marovitz noted:

> In my view, however, a serious difficulty arises when the statutory discrimination operates at the post-high school level. The state has asserted that persons enrolled in vocational training programs are intellectually inferior to those in college, but there is no documentation before us to indicate that such is uniformally (sic) or even generally true.

314 F. Supp. at 1090. This is the vice of T.C.A. § 50-6-242. The State has made a judgment that uneducated workers require benefits to which mentally disabled workers need not be given. Yet there is no showing that this supposition is valid or factually supportable, let alone that it

supremacy clause grounds; it therefore did not need to make an equal protection finding. Nonetheless, the Court undertook such an analysis and in the process cast grave doubt on the constitutionality of distinctions based on educational levels:

> [W]e think there is a serious question whether the Illinois classification can withstand the strictures of the Equal Protection Clause. The majority [on the three-judge panel] justified the classification as designed to attain the twin goals of aiding needy children to become employable and self-sufficient, and of insuring fiscal integrity of the State's welfare program. We doubt the rationality of the classification as a means of furthering the goal of aiding needy children to become employable and self-sufficient; we are not told what basis in practical experience supports the proposition that children with a vocational training are more readily employable than children with a college education. And a State's interest in preserving the fiscal integrity of its welfare program by economically allocating limited AFDC resources may not be protected by the device of adopting eligibility requirements restricting the class of children made eligible by federal standards.

404 U.S. at 291. Thus, even applying the rational basis test, the Court doubted the rationality of the classifications.

T.C.A. § 50-6-242 is subject to the same analysis--and result. In addition, when one factors in the possibility that this

particular statute may require the application of heightened scrutiny on account of Tenn. Const. Art 11, § 12, the constitutional infirmity of the statute upon equal protection grounds is established almost beyond any reasonable doubt.

This result is strengthened by the holding in French v. Heyne, 547 F.2d 994, 999 (7th Cir. 1976), which sustained a complaint seeking to strike down on equal protection grounds a practice that denied vocational or educational programs to reformatory inmates who already possessed vocational or high school degrees. The court denied

> that a rational basis for the classification . . . is apparent on the face of the classification itself. In the absence of an articulated purpose for the distinction drawn here, we cannot indulge in supplying an imaginary purpose or basis for the classification[.]

The Tennessee legislature has similarly failed to provide a rational (or heightened) basis for the distinctions in T.C.A. § 50-6-242. Thus, even if this distinction is to be judged by the rational basis test, the discrimination against educated, mentally disabled workers flunks the constitutional test notwithstanding. A grant of Writ here sought is appropriate.

3. **This case presents an important Supremacy Clause issue regarding whether Tennessee Code Annotated § 50-6-241 impermissibly conflicts with the Americans with Disabilities Act of 1990, 42 U.S.C. § 701 et seq. or Section 794 of the Rehabilitation Act of 1973, 29 U.S.C. § 710 et seq.** T.C.A. § 50-6-241(a)(1) should be struck down by this Court not only because it is

unconstitutional but in addition because it is hopelessly in conflict with federal statute law in the form of both the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. As such the statute cannot stand because "[u]nder Article VI of the United States Constitution, federal law takes precedence over conflicting state law." T.E.P. v. Leavitt, 840 F. Supp. 110, 111 (D. Utah 1993).

It has been held that "[t]he ADA is intended to insure that qualified individuals receive services in a manner consistent with basic human dignity rather than a manner which shunts them aside, hides, and ignores them." Helen L. v. DiDario, 46 F.3d 325, 335 (3rd Cir. 1995)(footnote omitted). The fact that the statute in issue "discriminates between workers whose medical problems are recognized by the [AMA] Guides and those whose problems are not, such as mental trauma and chronic pain syndrome" (Order at 2; App. C at 45), reveals that T.C.A. § 50-6-241(a)(1) is fatally inconsistent with that goal. Moreover, the statute is also wholly at odds with the specifics of this federal legislation.

In broad terms, the ADA proscribes discrimination on account of a disability. 42 U.S.C. § 12132. The State is subject to these strictures because "[t]he term 'public entity' means--(A) any State or local government[.]" 42 U.S.C. § 12131(1). See Stillwell v. Kansas City, Missouri Board of Police Commissioners, 872 F. Supp. 682, 686-87 (W.D. Mo. 1995)("across-the-board-exclusion on all one-handed applicants" by city police board violates ADA). Workers subject to T.C.A. § 50-6-241(a)(1) are entitled to invoke the

ADA because many of them are by definition "qualified individual[s] with a disability" under 42 U.S.C. § 12131(2).

Nor can there be any doubt that individuals suffering from "mental trauma and chronic pain syndrome" (Order at 2; App. C at 45), that is, those individuals whose medical problems are not recognized by the AMA Guides, are squarely within the coverage of the ADA.[9] The term "disability" as defined in 42 U.S.C. § 12101(2), clearly encompasses such individuals.

Certainly, it is clear as matters of simple definition and logic that individuals entitled to coverage pursuant to the Tennessee workers' compensation statute are encompassed under this definition by dint of the very fact that they are impaired emotionally or mentally to the extent that they are forced to seek an award under the statute. Cf. Clark v. Virginia Board of Bar Examiners, 861 F. Supp. 512, 517 (E.D. Va. 1994), which employed the very term "impairment" in concluding that the test as to whether an individual was covered by the ADA depended upon whether the "impairment" placed significant limitations on his ability to "perform any major life activity." In addition, the ADA is implicated in this Petition because it follows that both physical and mental impairments are disabilities under the

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[9] Because the distinction in T.C.A. § 50-5-241(a)(1) between individuals whose impairments are recognized by the AMA Guides and those whose maladies are not so recognized, does not follow a "bright line rule" (Opinion at 14; App. B. at 22), i.e., a definitional line between those who are covered by the ADA and those who are not, the statute as a whole violates the federal statute.

ADA. Stradley v. Lafourche Communications, Inc., 869 F. Supp. 442, 443 (E.D. La. 1994).

That the violation of the ADA in this case is the enactment of a statute rather than more informal (or discretionary) governmental action is no bar whatever to a finding that T.C.A. § 50-6-241(a)(1) violates the ADA. In T.E.P. v. Leavitt, supra, for example, the governmental violation of the ADA consisted in fact of the legislative enactment of a statute, Utah Code Ann. § 30-1-2(1)(1993 Supp.), legislation "which prohibits and declares void marriage by persons with acquired immune deficiency syndrome (AIDS)[.]" 840 F. Supp. at 111. The statute was held to be "violative of the Americans with Disabilities Act, 42 U.S.C. § 12101 et Seq, (ADA) (1993 Supp.), and the Rehabilitation Act of 1973 of 1973, as amended, 29 U.S.C. § 794 (1993 Supp.)." Id.[10] The same is true here; hence, the statute must be disapproved for its violation of these two enactments. As a result T.C.A. § 50-6-241(a)(1) is illicit on both constitutional and statutory grounds.[11]

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[10] Illegality under the ADA presumes the illegality of § 50-6-241(a)(1) under the Rehabilitation Act of 1973 as well, for "[t]he law developed under section 504 of the Rehabilitation Act is applicable to Title II of the ADA." Helen L. v. DiDario, supra, 46 F.3d at 330 n.7.

[11] Application of the holding in T.E.P. v. Leavitt, supra, would actually make resort to a constitutional analysis unnecessary; "because the offending statute runs afoul of federal statutory law, there is no need to determine whether the statute is unconstitutional under either the Utah State Constitution or the United States Constitution." Id. at 111.

The supreme court's treatment of this issue was both cursory and unconvincing; it merely recycled the argument used to dispatch Brown's equal protection argument to counter her Supremacy Clause allegation (Opinion at 25; App. B. at 36). The supreme court's argument was unconvincing in the equal protection context; it is equally unconvincing here. Accordingly, Brown asks that her Petition for a Writ of Certiorari be granted on this ground as well.

CONCLUSION

Therefore, Petitioner respectfully requests that this Court issue a writ of Certiorari to the Supreme Court of the State of Tennessee.

Respectfully Submitted,

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